

**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint No. : 2436 of 2018
First date of Hearing : 27.03.2019
Date of Decision : 27.03.2019

1. Mr. Gaurav Paul, and
2. Mrs. Mehak Sood Paul,
R/o. F/D-5, New Kavi Nagar, Ghaziabad,
Uttar Pradesh.

Complainants

Versus

M/s Umang Realtech Pvt. Ltd.
(through its Director)
Address: D- 64, 2nd floor,
Defence Colony, New Delhi-110001

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Ankit Sahai
Shri Yash Verma

Advocate for the complainants
Advocate for the respondent

ORDER

1. A complaint dated 11.01.2019 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainants Mr. Gaurav Paul and Mrs. Mehak Sood Paul, against the promoter M/s Umang Realtech Pvt. Ltd., on account of violation of the clause 6.1 read with clause 6.2 of apartment buyer agreement executed on

27.10.2014 in respect of apartment described as below for not handing over possession on the due date which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since the apartment buyer agreement dated 27.10.2014 was executed prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, so the penal proceedings cannot be initiated retrospectively. Therefore, the authority has decided to treat this complaint as an application for non-compliance of obligations on the part of respondent/ promoter under section 34(f) of the Act *ibid*.
3. The particulars of the complaint case are as under: -

1.	Name and location of the project	"Monsoon breeze 78 II", sector 78, village Naurangpur, Gurugram, Haryana.
2.	Nature of real estate project	Group housing colony
3.	Project area and DTCP license no.	38 of 2008 for 12.514 acres and 77 of 2012 for 7.342 acres.
4.	Total area of the project	19.85625 acres
5.	RERA registered/ unregistered	Registered vide no. 121 of 2017 for 12.514 acres and vide no. 14 of 2018 for 7.342 acres
6.	Revised date of completion of project as per RERA registration certificate	30.06.2018 for 121 of 2017 and 31.12.2020 for 14 of 2018
7.	Status of project	10% construction completed as per LC report in similar matter.
8.	Date of booking	07.09.2014
9.	Date of allotment	19.09.2014
10.	Apartment/unit no.	1203, 12 th floor, tower O
11.	Apartment measuring	1,550 sq. ft.

12.	Apartment buyer's agreement executed on	27.10.2014 (Annex C 2)
13.	Payment plan	Possession linked payment plan
14.	Total consideration as per the agreement	Rs.1,03,46,250/-
15.	Total amount paid by the complainant till date	Rs.36,44,014/- as per the receipts annexed and Rs. 36,57,197/- as per the complainant's version.
16.	Percentage of consideration amount paid	35.22%
17.	Due date of delivery of possession as per agreement dated 27.10.2014 (clause 6.1 and 6.2: 42 months plus 180 days of grace period from the date of approval of building plans or signing of this agreement, whichever is later)	27.10.2018 Note: Date of approval of building plan is not mentioned anywhere so the due date of delivery of possession is calculated from the date of signing of agreement.
18.	Delay in handing over possession till 27.03.2019	5 months
19.	Penalty clause as per apartment buyer agreement dated 27.10.2014	Clause 6.7 of the agreement i.e. Rs.5/- per sq. ft. of the super area of the apartment for every month of delay till the actual handing over of the possession.

4. The details provided above have been checked on the basis of record available in the case file which have been provided by the complainants and the respondent. An apartment buyer's agreement dated 27.10.2014 is available on record for the aforesaid apartment. The possession of the said unit was to be

delivered by 27.10.2018, as per the agreement. Neither the respondent has delivered the possession of the said unit as on date to the purchaser nor they have paid any compensation @ Rs.5/- per sq. ft. of the super area of the apartment for every month delay till the actual handing over of the possession as per clause 6.7 of apartment buyer's agreement dated 27.10.2014. Therefore, the promoter has not fulfilled his committed liability till date.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The respondent through his counsel has appeared on 27.03.2019. The case came up for hearing on 27.03.2019. The respondent has filed their reply on 01.03.2019 which has been perused by the authority.

Facts of the complaint: -

6. Briefly put facts relevant for the disposal of the present complaint as per the complainants' version are that on the allurements of the respondent company, the complainants had jointly booked a flat in tower O, apartment no. 1203, 12th floor at monsoon breeze II, sector 78 having a super area of 1550 sq. ft. approximate.
7. The complainants submitted that they had made a total payment of R. 36,57,197/- to the respondent towards the cost of the said flat.

8. The complainants further submitted that on 27.10.2014, flat buyer agreement was executed between the parties. It was stated in the agreement that as per clause 6.1 of the said agreement, possession of the flat was to be delivered within a period of 42 months from the date of approval of building plan or signing of agreement whichever is later.
9. The complainants alleged that on visiting the site they were shocked to see that there was no construction done on the site other than a few dugged foundations and a two storey building. It was further alleged by the complainants that they were duped of their hard earned money which they invested for fulfilling their dream of owning a house. The respondent due to absence of any deterrent legislation were involved in looting the public including the complainant as there was no authority to control the illegalities of the respondent, but after RERA Act was passed, the respondents are running here and there to hide their illegalities and default and are now awoken from their slumber and thus tried to compensate the complainants by providing offers such as swapping to one of their other projects which is winter hills, sector 77, Gurugram. This information was intimated to the complainants through emails in the month of September, 2017 to avoid any litigation but even has been now declined by the respondent as was also rejected by the complainants because of the higher price of the same.
10. The complainants submitted that after witnessing the conduct of the respondent and also after witnessing no progress of the

project at the site sought refund of the all the paid amount alongwith interest @ 18% p.a. as the respondent has failed to deliver the possession of the booked flat despite lapse of more than 4-5 years.

11. It is submitted that the complainants have invested all their hard earned money and besides this he had availed a loan facility of Rs. 13,00,000/- and paid the same to the respondent. The said loan amount is carrying interest at the rate of 9% p.a. and the same is being paid by the complainant by way of instalments alongwith interest and as such the complainant has pressure and liability to maintain his family.
12. It is further submitted that respondent has denied to refund the paid amount of the complainant despite repeated reminders and personal meetings.
13. The respondent vide letter dated 1st September, 2017 approached the complainants and shown their inability to complete the said project i.e. Monsoon Breeze Phase II and offered for reorganized the allocation of spaces within the projects of Umang Realtech, Gurugram and proposed to shift to unit no. B-1301 Winter Hills, sector 77, Gurugram from unit no. O-1203, Monsoon Breeze Phase II, sector 78 Gurugram and stated that the said site is at an advance stage of completion. After physical verification of the said new site, it was not found suitable to the complainant and approached the respondent for seeking refund of the paid amount with interest but of no avail. Hence, this complaint.

Issues to be determined: -

- i. Whether the respondent company signed flat buyer agreement for offering/handing over possession within 42 months from booking date, and after spending 4 years' project is uncompleted as per progress of construction?
- ii. Whether the complainants are entitled for the refund of the principal amount after giving notice of 90 days from the expiry of above mentioned period of 42 months' as per the terms of flat buyer agreement dated 27.10.2014?
- iii. Whether as per the project current construction status as already admitted by the respondent in their email to the complainants, it will take 2-3 years more for the stage to arrive for offer of possession by the respondent to the complainants?
- iv. Whether the delay in delivery of possession is justified?

Reliefs sought:-

1. Direct the respondent to refund the entire money paid by the complainants Rs. 36,57,197/- along with interest @ 18% p.a.
2. Direct the respondent to pay Rs. 1 lakh as compensation for mental agony and Rs. 27,500/- as litigation charges to the complainants.

Respondent's reply:-

14. The respondent raised preliminary objections that the present complaint is filed without any cause of action and only on

experimental basis. The respondent contended that there is arbitration clause i.e. clause 13.9 in the agreement as per which the dispute pertaining to the agreement should be referred to the arbitration and the present complaint is not maintainable.

15. The respondent further contended that there was no delay since the respondent is entitled for reasonable extension of time for handing over possession in terms of agreement. The present complaint is an abuse of the process of law. The main grievance in the complaint is that there is delay in delivery of possession. It is submitted that in the present case there is no deliberate or wilful delay in completing construction and handing over possession of the apartment. The possession could not be handed over only because of the reasons which are beyond the control of the Respondent and hence a reasonable extension of time is required in terms of clause 6.4 of the apartment buyer's agreement. Clause 6.4 of the agreement is quoted hereunder-

"**6.4:** Force Majeure shall mean any of the following events circumstances or combination thereof which may prevent/obstruct/hinder/delay the construction/development of the Project by the Developer including act of God e.g. fire, drought, flood, typhoon, tornado, landslide, avalanche, tempest, storm, earthquake , epidemics or other natural disasters, explosions or accidents, strikes or lock-outs; civil war, riots, insurgency, embargo, revolution, acts of terrorism, military action, any delays caused by competent authority with respect to obtaining approvals pertaining to the Project, any change in law, court order/injunction, or from any other similar cause, any event or circumstances analogous to the foregoing. "

16. It was submitted by the respondent that delay in construction was caused due to the reasons beyond the control of the respondent. The respondent submitted that the real estate sector is facing global recession which hits the economy badly due to which the number of bookings made by the prospective purchasers reduced drastically in comparison to the expected bookings made by the prospective purchasers. Apart from this, there were various other problems which are beyond the control of the respondent which seriously affected the construction:
- a. Lack of adequate sources of finance;
 - b. Shortage of labour;
 - c. Rising manpower and material costs;
 - d. Approvals and procedural difficulties.
17. The respondent submitted that in addition to aforesaid challenges the following factors also played major role in delaying the offer of possession i.e. shortage of water, bricks, unexpected declaration of demonetization policy by the Central Government, affected the construction work, shortage of labour due to implementation social scheme like NREGA and JNNURM. All these problems are beyond the control of the respondent and possession could not be offered to the complainant only because of the reasons explained above which falls within the purview of clause 6.4 of the agreement, the respondent stated that they are entitled for reasonable extension of time for handing over the possession to the complainant.

18. The respondent submitted that they are customer oriented organization and are ready and willing to offer an option of transfer of their booking to the complainant in their another project being developed by the respondent i.e. "monsoon breeze ABLM towers" occupancy certificate applied or "winter hills 77", Gurugram or "winter hills dwarka morh" occupancy certificate received. It is submitted that the construction in project 'monsoon breeze ABLM towers' is complete and application has been filed for issuance of OC and the apartment is ready to move, whereas the construction at project "winter hills 77", Gurugram is under progress and the respondent can offer possession in June, 2019, these all projects are at finishing stage and the respondent can handover the possession very soon.
19. The respondent contended that the complainants have approached this authority with unclean hands: - The complainants have filed the present complaint with incomplete and untrue facts and thus played fraud on this hon'ble authority. It is the settled law that a party who approached the court with unclean hands, disentitles himself from getting any relief whatsoever. As such the present complaint deserves dismissal with exemplary costs. The captioned complaint has been filed by the complainants with the sole objective of being unjustly enriched. Firstly, the challenges being faced by the real estate industry as a whole are being simply brushed aside; secondly the mechanism which has been put in place by the respondent to compensate the buyers for delay in completion of project is being disregarded by them. The buyers

were well aware of the contractual provisions and they have agreed to purchase the apartment only after carefully understanding each and every clause of the agreement. It was never projected by the respondent that there may not be an eventuality of delay. Keeping any such eventuality in mind, the complainants had agreed to purchase the apartment. It may be appreciated that the developer does not gain anything in case its project completion is delayed. There are wide scale financial ramifications, which the developer has to face. Clearly, the complainants in the present case have embarked upon a witch hunt against a genuine developer like the respondent who has good intention to complete the construction of the project as early as possible.

20. The respondent contended that the alternative civil remedies ought to have been availed instead of approaching this hon'ble authority. It is submitted that the complainants have prayed for relief for refund of the amount paid which have to be claimed in a suit for recovery after paying ad volerum court fee. That in order to avoid the payment of court fee, the complainants have filed the present complaint of a civil nature in this authority. It is submitted that the present complaint requires elaborate evidence as it involves complicated questions of facts and law which cannot be adjudicated upon under the summary jurisdiction of this hon'ble authority. In this view of the matter, the complaint is liable to be dismissed with costs.

21. The respondent further contended that the complainants are not entitled to seek any remedies beyond the terms of the agreement. It is submitted that as per the apartment buyer agreement which is legally binding between the complainants and the respondent, the parties have agreed upon their respective liabilities in case of breach of any of the conditions specified therein. It is submitted that the liability of the respondent on account of delay is specified in clause 6.7 of the apartment buyer agreement and as such the complainants cannot claim reliefs which are beyond the compensation agreed upon by him. In this view of the matter, the captioned complaint is not maintainable in law and liable to be dismissed in limine. It is a well settled proposition of the law that the courts cannot generate altogether a new contract; the responsibility of the courts is to interpret appropriately the existing contract and decide the rights and liabilities of the parties within the four corners of the contract. It is submitted that the apartment buyer agreement delineates the respective liabilities of the complainants as well as the respondent in case of breach of any of the conditions specified therein. In this view of the matter, the complaint is not maintainable in law and is liable to be dismissed in limine.
22. It is submitted by the respondent that they are ready to shift the complainant's booking to another project.
23. In view of aforementioned facts, it is submitted that the captioned complaint is frivolous, vague and vexatious in nature and the complaint has been made to injure the interest and reputation of

the respondent and therefore, the instant complaint is liable to be dismissed in limine.

Determination of issues: -

After considering the facts submitted by the complainant and perusal of record available in the file, the issue wise findings of the authority are as under: -

24. With respect to the **issue no. i, ii, iii and v** raised by the complainants, the authority came across that as per clause 6.1 read with clause 6.2 of apartment buyer agreement, the possession of the said apartment was to be handed over within 42 months plus 180 days' grace period from the date of approval of building plans or signing of this agreement, whichever is later. In the present case, the date of sanction of building plan was not mentioned by either of the parties, but the apartment buyer agreement was signed on 27.10.2014. Therefore, the due date of handing over possession shall be computed from signing of this agreement. The clause regarding the possession of the said unit is reproduced below:

"6. Possession of Apartment

6.1 Subject to other terms of this agreement including but not limited to timely payment of the total sale price, stamp duty and other charges by the buyer, force majeure conditions, and also subject to the buyer(s) having complied with all formalities or documentation as prescribed by the developer, the developer shall endeavour to handover the possession of the said apartment to the buyer

within a period of 42 months from the date of approval of the building plans or signing of this agreement, whichever is later.

6.2 the buyer further agrees and understands that the developer shall additionally be entitled to a period of 180 days' grace period, after the expiry of the said committed period."

25. The apartment buyer agreement was executed on 27.10.2014 and the due date of handing over possession as per the said agreement is 27.10.2018 and accordingly the possession has been delayed by five months (approx.). Thus, the respondent has failed to adhere with the terms of the said agreement and failed to develop the said project in prescribed timeline.
26. With respect to **issue no. iv** raised by the complainants, the authority is of the view that the penal provision of the Act *ibid* is not applicable to the retrospective transaction. Since the flat buyer agreement dated 27.10.2014 was executed prior to the commencement of the Act, so the penal cost cannot be imposed on the respondent, however, the respondent is liable to pay interest at the prescribed rate on refund of the paid amount in terms of section 18 (1) proviso of the Act read with rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017.

Findings of the authority:-

27. The preliminary objection regarding jurisdiction of the authority as raised by the respondent stands dismissed. The authority has complete jurisdiction to decide the complaint in

regard to non-compliance of obligations by the promoter as held in *Simmi Sikka V/s M/s EMAAR MGF Land Ltd.* leaving aside compensation which is to be decided by the Adjudicating Officer if pursued by the complainant at a later stage.

28. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district, therefore this authority has complete territorial jurisdiction to deal with the present complaint.
29. With regard to the preliminary objection raised by the respondent regarding arbitration clause 13.9 of the agreement dated 27.10.2014, the authority is of the considered opinion that it has been held in a catena of judgments of the Hon'ble Supreme Court, particularly in *National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506*, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause.
30. Further, in *Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015*, it was held that the arbitration clause in agreements between the complainants and

builders could not circumscribe jurisdiction of a consumer. This view has been upheld by the Supreme Court in **civil appeal no.23512-23513 of 2017** and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view.

31. Complaint was filed on 11.01.2019. Notices with respect to reply to the complaint were issued to the respondent on 14.01.2019, 24.01.2019 and 04.02.2019. Besides this, a penalty of Rs. 5,000/- and Rs. 10,000/- was also imposed on 24.01.2019 and on 04.01.2019 for non-filing of reply even after service of notices. However, despite due and proper service of notices, the respondent has not paid the penalty amount. From the above stated conduct of the respondent, the authority has no option but to proceed ex-parte against the respondent and to decide the matter on merits by taking into count legal/factual proposition as raised by the complainant in his complaint. A final notice dated 11.03.2019 by way of email was sent to both the parties to appear before this authority on 27.03.2019.
32. Shri Yash Verma, advocate has appeared on behalf of the respondent. He has not deposited the amount of penalty with the authority and now sought for a short adjournment but his request is declined by this authority. The exparte proceedings continued to prevail as counsel for the respondent has not deposited the penalty amount of Rs. 15,000/- so imposed by the authority.

33. As per clause 6.1 and 6.2 of the builder buyer agreement dated 27.10.2014 for unit no. 1203, 12th floor, tower O in the project “Monsoon Breeze 78-II” at sector 78, Gurugram, possession was to be handed over to the complainants within a period of 42 months from the date of approval of building plan or signing of agreement, whichever is later plus 180 days’ grace period. The due date of delivery of possession comes out to be 27.10.2018. However, the respondent has not delivered the unit in time. Complainants have already paid Rs. 36,44,014/- to the respondent against a total sale consideration of Rs. 1,03,46,250/-.
34. As per the photographs submitted by the counsel for the complainants, there is no progress with respect to the construction at the site and the project is abandoned. Complainants have insisted for refund of the deposited amount.
35. During the course of arguments, counsel for the complainants averred that there is no progress with respect to construction of work. Since there is no hope and scope for completion of project, hence the authority left with no other option but to direct the respondent for the refund of entire paid amount of the complainants alongwith prescribed rate of interest i.e. 10.75% per annum.

Decision and directions of the authority: -

36. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising


powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions to the respondent in the interest of justice and fair play:

- *The respondent is directed to refund the amount of Rs.36,57,197/- received by him from the complainants along with interest at the prescribed rate i.e. 10.75% per annum from the date of receipt of each payment within a period of 90 days from the date of this order.*

37. The order is pronounced.

38. Case file be consigned to the registry.


(Samir Kumar)
Member


(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: -.....